No. 93-766

In The

Supreme Court of the United States

October Term, 1993

Supreme Court, U.S.
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JULIUS RYTMAN, DORA RYTMAN, COLCHESTER EGG FARMS, INC., RYTMAN GRAIN, INC., JULIUS AND DORA RYTMAN PROPRIETORSHIP, PINECREST DUCK FARM TRUST, AND AGRI-FINANCE, INC.

Petitioners,

vs.

KOFKOFF EGG FARM LIMITED PARTNERSHIP, SAMUEL KOFKOFF, ROBERT KOFKOFF, JOSEPH FORTIN, BLAIR HAGY, COLCHESTER FOODS, INC., PIERCE HOLLOW FARMS, FITCHVILLE REALTY, INC., CONNECTICUT NATIONAL BANK, NORWICH SAVINGS SOCIETY, BROWN, JACOBSON, JEWETT & LAUDONE, P.C. N/K/A BROWN, JACOBSON, TILLINGHAST, LAHAN & KING, P.C., MILTON JACOBSON, AND GLENN GORDON

Respondents.

Petition For Writ of Certiorari To The United States Court of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. What is the standard of review of a District Court's finding that an amendment is "futile" when the amendment is filed to cure deficiencies raised by a Motion To Dismiss Pursuant to Federal Rules of Civil Procedure 12(b)(6)?

2. Whether a State Court Complaint, removed to the Federal Court, should be scrutinized under applicable state procedural rules as opposed to Federal Rules of Civil Procedure 9(b)?

3. Whether Reves v. Ernst & Young applies to 18 U.S.C. Section 1962(b) cases?

4. Are bankers exempt from RICO?

5. Do allegations of state criminal extortion constitute predicate acts under RICO?

6. Whether the Petitioners have alleged a claim under RICO, 18 U.S.C. Sections 1961-1968 through claims of violations of the Hobbs Act and state law extortion against lenders?

7. Whether actions of mortgagees and lenders constite "acquisition or maintenance of an interest in or control" required under 18 U.S.C. 1962(b)?

8. Whether the circuit court should have been required to analyze Petitioners' claims against its attorney and allegations beyond the time period covered by the District Court?

9. Whether a Federal Court can act on a Motion

for Summary Judgment when discovery is outstanding and the party opposing summary judgment has requested the opportunity to conduct discovery before the motion is heard?

PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all parties to the proceedings in the Second Circuit.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINION BELOW

The opinions of the Second Circuit Court of Appeals are not officially reported and appear in Appendix A 1-12 and 25-26.

The opinions of the District Court are not officially reported and appear in Appendix A 13-24.

JURISDICTION

The judgment of the Court of Appeals (A 1-9) was entered on June 21, 1993. A petition for rehearing was denied on August 10, 1993 (A 25-26). The jurisdiction of the Court invoked under 28 U.S.C. Section 1254(1).

STATUTORY AND FEDERAL RULES OF CIVIL PROCEDURE

This case involves the following statutes and Rules of Federal Civil Procedure; and are included in the Appendix at the end of the Petition:

::

I. Federal Rules of Civl Procedure 9(b);

II. Federal Rules of Civil Procedure 15(a);

III. Federal Rules of Civil Procedure (12(b)(6);

IV. Federal Rules of Civil Procedure 56(f);

V. Federal Rules of Civil Procedure 59(e);

VI. Federal Rules of Civil Procedure 81(c);

VII. Federal Rules of Civil Procedure 60(b);

VIII. 18 U.S.C. Section 1961(1); 1962(b)(c)(d);

IX. 18 U.S.C. Section 1341;

X. 18 U.S.C. Section 1343;

XI. 18 U.S.C. Section 1951;

XII. 28 U.S.C. Section 1446(d);

XIII. Connecticut General Statute Sec. 53a-119.

STATEMENT OF THE CASE

A. Proceedings and Disposition Below

This is an action arising under the Racketeering Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. 1961-1968. Petitioners (Julius Rytman, Dora Rytman, Colchester Egg Farms, Inc., Rytman Grain, Inc., Julius and Dora Rytman Proprietorship, Pincecrest Duck Farm Trust, and Agri-Finance, Inc. ("Rytmans")) filed and served their summons and complaint on November 2, 1992. Respondents (Kofkoff Egg Farm Limited Partnership, Samuel Kofkoff, Robert Kofkoff, Joseph Fortin, Blair Hagy, Colchester Foods, Inc., Pierce Hollow Farms, Fitchville Realty, Inc. ("Kofkoff"), Connecticut National Bank ("CNB"), Norwich Savings Society ("NSS"), Brown, Jacobson, Jewett & Laudone, P.C. n/k/a Brown, Jacobson, Tillinghast, Lahan & King, P.C., Milton Jacobson, and Glenn Gordon ("Jacobson")) filed Motions to Dismiss

under Rule 12(b)(6) on June 2, 1991, June 1, 1992, and May 27, 1992. Respondent, NSS filed a Motion for Summary Judgment on June 4, 1992. The District Court, without oral argument, (even though the Rytmans requested it) granted the Respondents' motions on August 31, 1992 that the Rytmans failed to state a claim. Said ruling did not provide for a leave to amend. Petitioners filed several post judgment motions including a Motion to Alter and Amend Judgment (pursuant to F.R.C.P. 59(e)) and a Motion for Reconsideration on September 23, 1992 and September 18, 1993. Said motions requested, in part, Leave to Amend the Complaint. On February 18, 1993, the District Court granted the Motion to Reconsider and denied the Motion to Alter and Amend Judgment. The Court denied Leave to Amend on the basis that the Amended Complaint did not cure the defects the Court found in the original Complaint discussed under Rule 12(b)(6) for failure to state a claim.

Petitioners appealed to the Second Circuit on December 24, 1992 and February 22, 1993. Oral arguments were heard on June 14, 1993. On June 21,

1993, the Second Circuit affirmed the District Court's decision. On July 6, 1993, Petitioners filed a Petition for Rehearing with a suggestion that it be heard En Banc. The Petition was denied on August 10, 1993. Petitioners now seek certiorari.

FACTUAL ALLEGATIONS

Petitioners allege that the respondents ("defendants") engaged in a number of criminal schemes in which they controlled and acquired interests in the Rytmans' businesses which consisted of an integrated poultry business ("the enterprise").

The defendants consist of the Kofkoff group, who were competitors, joint venturers and lenders of the Rytmans' enterprises; Connecticut National Bank ("CNB") was a lender to Rytman and Kofkoff; and Norwich Savings Society ("NSS") was a loan participant with CNB on a Rytman guaranteed loan; the defendants attorneys (collectively referred to as Jacobson) who represented the Rytmans, their enterprise and the Kofkoffs, in the same transactions, wrongfully and fraudulently provided legal advice to the Rytmans and assisted the Kofkoffs

in committing acts of extortion and fraud that resulted in Kofkoffs' control and acquisition of the interests of Rytmans' enterprises. (Jacobson also represented CNB and NSS during this period of time).

CNB wanted to terminate its relationship with Petitioners and strengthen its relationship with Kofkoff. Jacobson, as attorney for both sides of the transaction, was instrumental in assisting the other defendants in the various schemes to benefit its clients Kofkoff, NSS, CNB, and itself. Additionally, NSS was outraged by CNB's embezzlement/conversion of purchase money funds allocated to CNB as opposed to other creditors (including NSS), which it fraudulently obtained from the Petitioners when Petitioners acquired the real estate that NSS and CNB had secured a participation mortgage. NSS used its knowledge of CNB's embezzlement/conversion and fraud to gain the status of co-lead lender on all of Petitioners loans with CNB. Once NSS obtained co-lead status, it proceeded to use CNB's mortgages and collateral rights in a manner that was beyond the rights contained in the documents themselves and

beyond the rights afforded by state law. The wrongful use of these rights resulted in NSS controlling the Petitioners' enterprises' liquidation in an unlawful manner. The wrongful use of these rights resulted in NSS acquiring $190,000 of Petitioners' enterprise's assets to which NSS did not have a legal right. The wrongful use of these rights resulted in NSS, along with the other defendnats, acquiring all of Petitioners' assets at a fraction of their value.

The entire Amended Complaint is set forth in Appendix Volume 1 A1-1, et seq. and it sets out a narrative of the events and the 117 predicate acts.

The Petitioners alleged that they were solvent and had more than enough assets to pay all of their obligations to Kofkoff, CNB and NSS and be left with substantial assets. The Petitioners alleged that the defendants through a pattern of racketeering (including the predicate acts in violation of, inter alia, Connecticut General Statutes Section 53a-119(5) et seq., (Connecticut criminal extortion), Hobbs Act, 18 USC Sec. 1951, Mail, 18 USC Sec. 1341 and Wire

Fraud, 18 USC Sec. 1343), caused the Petitioners to default on their obligations to Kofkoff, CNB and NSS and once the Petitioners had defaulted, the defendants, through a pattern of racketeering (including predicate acts in violation of inter alia, Connecticut criminal extortions, Hobbs Act, Mail and Wire Fraud), prevented the Petitioners from curing the default and extinguishing their debt. The Petitioners alleged that the defendants through a pattern of racketeering activity were able to wrongly induce, compel and defraud the Rytmans to consent to the acquiring and maintaining directly and indirectly of an interest in and control of the Petitioners' enterprises. The Petitioners' alleged, in their Amended Complaint (set forth in Appendix Volume 1 "A1") a minimum of 117 predicate acts of which 33 were specifically alleged as mail/wire fraud. The other predicate acts consisted of state law claims and Hobbs Act violations.

The Petitioners have alleged that the defendants then, through a pattern of racketeering activity, proceed to wrongfully control the Petitioners and

their enterprise so that the defendants could acquire, through a sham and fraudulent repossession and foreclosure procedure, the assets of the Petitioners' enterprise thereby leaving the Petitioners and their enterprises assetless and still in debt to Kofkoff, CNB and NSS even though Petitioners' enterprise's assets were worth substantially more than the debt due to the Kofkoff, CNB and NSS and Petitioners would have been able to pay their debts in full to Kofkoff, CNB, and NSS if the defendants exercised their contractural and legal rights as opposed to extorting and defrauding the Petitioners.

REASONS FOR GRANTING THE WRIT

I. WHAT IS THE STANDARD OF REVIEW OF A DISTRICT COURT'S FINDING THAT AN AMENDMENT IS "FUTILE" WHEN THE AMENDMENT IS FILED TO CURE DEFICIENCIES RAISED BY A MOTION TO DISMISS PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(b)(6)

This case raises the issue of what standard of review the Circuit Court's must use in reviewing decisions of law made by the District Court, namely, that an amended complaint does not state a claim as a matter of law. The Second Circuit adopts an abuse of

discretion standard of review wherein the Circuit Court does not even read the Amended Complaint but only the reasons given by the District Court in denying leave to amend. This is in conflict with other Circuits that held, in general, that all Rule 12(b)(6) rulings dismissing complaints based upon the legal conclusion that the Amended Complaint fails to state a claim as a matter of law must be reviewed de novo by the Circuit Court. Although the issue comes up via a Rule 59(e) motion, the question of what is the standard of review whenever a District Court states, as the District Court stated here, that the Amended Complaint "did not remedy the [Rule 12(b)(6)] deficiencies. The Second Circuit affirmed the District Court's decision because the reason given by the District Court was that the proposed Amended Complaint would be "futile" under the language of Foman v. Davis, 371 U.S. 178, 182 (1962). Foman also dealt with a Rule 59(e) motion. However in that case, the amendment to add a new cause of action after dismissal of the complaint under Rule 12(b)(6). Therefore, the issue by this case goes

beyond Foman's facts because it deals with the standard of review of a District Court's refusal to allow an amendment to cure a complaint found deficient under Rule 12(b)(6) where the District Court finds the amendment would be "futile". In short, what is the appellate review standard for a district court finding that of the "futility of amendment"?

This case raises an important question regarding appellate review. "Independent appellate review of legal issues best serves the dual goals of doctrinal coherence and economy of judicial administration.... Courts of Appeals .... are structurally suited to the collaborative judicial process that promotes decisional accuracy." Salve Regina College v. Russell, 499 U.S. 225, 111 S.Ct. 1217, 1221, 113 L.Ed.2d 190 (1991).

In the present case, the defendants' prevailed on a Rule 12(b)(6) motion to dismiss for failure to state a claim (and a Motion for Summary Judgment as to NSS on the same basis) thereby, dismissing the original complaint. The Petitioners then sought

leave to amend their complaint. The District Court reviewed the amended complaint and ruled that the amended complaint:

> "fail[ed] to remedy the deficiencies prompting judgment [based upon Rule 12(b)(6)] for the defendants."

This was a Rule 12(b)(6) ruling.

The Rytmans appealed the dismissal of the complaint and the District Court's ruling on their requested amendment to the Second Circuit.

The Second Circuit, without independently reading and reviewing the Amended Complaint de novo, affirmed, the District Court's holding. The Second Circuit found that the review, conclusion and evaluation of the District Court did not constitute reversible error using the "abuse of discretion" standard of review. (N.b. The Second Circuit Court improperly applied this standard because the Second Circuit did not read the Amended Complaint and, therefore, was not in a position to even evaluate whether the District Court had abused its discretion. Foman v. Davis, 371 U.S. 178, 181-182 (1962); Gaubert v. Federal Home Loan Bank Board, 863 F.2d 59, 68

(D.C. Cir. 1988); Dussory v. Gulf Coast Investment Corp., 660 F.2d 594, 598 (5th Cir. 1981); Nolin v. Douglas County, 903 F.2d 1546, 1550 (11th Cir. 1990)).

Any appellate review of a decision based upon Rule 12(b)(6) requires the appellate court to read the facts alleged and conduct de novo review. The Supreme Court held in H.J., Inc. v. Northwestern Bell Company, 492 U.S. 229, 249-250, 109 S.Ct. 2893, 2906 (1989) (reversing a dismissal of a RICO claim):

> Because respondents prevailed on a motion under Federal Rule of Civil Procedure 12(b)(6), we [the Supreme Court] read the facts alleged in the complaint in the light most favorable to petitioners. And we may only affirm the dismissal of the complaint if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S.Ct. 2229, 2232, 81 L.Ed.2d 59 (1984)

Id. at 2906.

The position of the Second Circuit in applying the abuse of discretion standard of review that does not include reading the Amended Complaint is in conflict with other Circuits. Gaubert, supra, Federal Circuit, Dussory, supra, Fifth Circuit, Nolin, supra, the Eleventh Circuit which requires

the Court to read the Complaint. The Second Circuit is also in conflict with the Sixth Circuit's position where that Court held that ".... the district court has based its decision on 'a legal conclusion that the amended [RICO] pleading would not withstand a motion to dismiss'", the review of "such a decision is de novo." Vild v. Visconsi, 956 F.2d 560, 565 (6th Cir. 1992), cert. denied, U.S. , 113 S.Ct. 99, citing, Martin v. Associated Truck Lines, Inc., 801 F.2d 246, 248 (6th Cir. 1986); see also Dana Corp. v. Blue Cross & Blue Shield, 900 F.2d 882, 887 (6th Cir. 1990); Dugan v. Brooks, 818 F.2d 513, 516 (6th Cir. 1987).

In Vild v. Visconsi, 956 F.2d 560 (6th Cir. 1992), the Sixth Circuit held:

> If the third amended complaint is not sufficient to establish a RICO claim and rectify what the district court deemed to be jurisdictional deficiencies, then there was no error in denying the motion to amend. See Martin, 801 F.2d at 248. If, on the other hand, the third amended complaint does sufficiently state a RICO claim, then we must examine with great care the denial of leave to amend. The essence of Vild's appeal is his assertion that the third amended complaint sufficiently stated a RICO claim.

Id., at 565. The essence of Petitioners' appeal in

this case is their assertion that the amended complaint sufficiently stated a RICO claim. The Second Circuit failed to conduct de novo review of the Amended Complaint. The Supreme Court should grant certiorari, reverse the decision and remand this case to the Second Circuit to conduct de novo review.

In conducting a de novo review, the Circuit Court is not permitted to give the District Court's legal conclusion any deference. Salve Regina College v. Russell, 499 U.S. 225, 111 S.Ct. 1217, 1224, 113 L.Ed.2d 190, (1991); Advanced Cardiovascular System, Inc. v. Scimed Life Systems, 988 F.2d 1157, 1160 (Fed. Cir. 1993); Vild, supra, Eades v. Thompsom, 823 F.2d 1055, 1060 (7th. Cir. 1987). Petitioners know of no circuit that allows anything less than de novo review of a ruling of the District Court involving whether an amended complaint is sufficient under Rule 12(b)(6).

The Second Circuit was also required to conduct a de novo review of the Amended Complaint as it related to the granting of the Motion for Summary Judgment. Adams v. Gould, Inc., 739 F.2d 858, 864 (3d Cir.

1984), cert. denied, 469 U.S. 1122. The Court, in Adams, supra, held that it had to conduct de novo examination of the substance of the claims asserted in the Amended Complaint in order to determine if the Leave to Amend should have been denied. Ibid.

The failure of the Second Circuit to conduct a de novo review of the Amended Complaint is particularly harsh, in this case, where the District Court made significant errors in its finding of fact which were used by the District Court to make its conclusion that the Petitioners had no claim. The defendants did not dispute these errors were made. A de novo review would have resulted in the Circuit Court understanding the correct allegations of fact. Further, to the extent that it was necessary to satisfy Rule 9(b), the Second Circuit, if it conducted de novo review of the amended complaint, would have found that the Petitioners satisfied the particularities requirements of Rule 9(b). The Amended Complaint alleged thirty-two mail/wire fraud violations that met the Rule 9(b) particularity requirement and corrected the deficiency of the

original state court complaint referred to in the Second Circuit decision. As to paragraph 10(mmmm)(i), see paragraph 96 of the Amended Complaint, P. 42, Appendix Vol. 1.):

> "96. On November 6, 1986, Blair Hagy, an employee of Colchester Foods, Inc. sent, via the mail, to the plaintiffs, a fraudulent accounting with respect to the monies paid pursuant to the Egg Supply Agreement. Said letter fraudulently represented the that plaintiffs Julius Rytman and Dora Rytman owed Colchester Foods monies under the agreement by listing false, fraudulently made up costs. Mr. Hagy's letter stated that Julius Rytman and Dora Rytman owed Colchester Foods, Inc. approximately $172,000. In fact, the Kofkoff defendants actually owed them money under the Egg Supply Agreement and the other contracts of over $600,000 for the period running from May 3, 1986 to February 20, 1987. No additional money was due to Colchester Foods, Inc. at the time the letter was sent. This fraudulent letter set the Kofkoff Defendants' scheme to acquire the enterprises assets in motion."

The Supreme Court should clarify this issue and hold that the standard of review of a District Court's refusal to grant leave to amend under Rule 15(a) on the basis of the "futility of the amendment" to cure Rule 12(b)(6) deficiencies is de novo review consistent with H.J., Inc., supra, and Vild, supra, or that the abuse of discretion standard requires a reading of the amended complaint to see that the

decision of the District Court is correct in light of the amended pleading as opposed to an analysis of discretion standard that is limited to an analysis of whether the District Court gave the right reason without reviewing complaint to verify that the reason was proper.

Either way, the Supreme Court should grant certiorari, and reverse and remand directing the Circuit Court to read the amended complaint and apply the appropriate standard.

II. THE COURT SHOULD RESOLVE THE CONFLICT AS TO WHETHER A STATE COURT COMPLAINT, REMOVED TO FEDERAL COURT, SHOULD BE SCRUTINIZED UNDER APPLICABLE STATE PROCEDURAL RULES AS OPPOSED TO FEDERAL RULES OF CIVIL PROCEDURE 9(b)

This case presents another significant and timely issue facing the Federal Courts nationwide, namely, what pleading requirements should be used to analyze a state court complaint removed to federal court. With the advent of bank failures and the generous removal rights under such acts as the Financial Institutions Reform Recovery and Enforcement Act of 1989 as amending the Deposit Insurance Act, 12 USC

Section 1819(A)(2)(B), the issue of what standards will be used to review state court pleadings is one that should be addressed by this Court.

The plaintiffs filed this action in State Court as was their right. Tafflin v. Levett, 493 U.S. 455 (1990). It was removed to the Federal Court over plaintiffs opposition pursuant to 28 USC Section 1446(d), by the defendants. The Federal Rules of Civil Procedure governing removed cases is Rule 81(c) which provides, in relevant part:

> (c) Removed Actions. These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal. Repleading is not necessary unless the court so orders.

The District Court did not order the plaintiffs in this case to replead pursuant to Rule 81(c) or any other rule.

The controlling case concerning a state complaint removed to federal court is Granny Goose Farms, Inc. v. Brotherhood of Teamsters, Inc., 415 U.S. 423, (1974), which holds:

> Judicial economy is promoted by providing that proceedings had in state court shall have force and effect in federal court, so that pleadings

> filed in state court, for example, need not be duplicated in federal courts.

415 U.S. at 435-36.

Pursuant to Rule 81(c), "Repleading is not necessary unless the Court so orders." Lally v. Allstate Ins. Co., 724 F.Supp. 760, affirmed, 830 F.2d 28 (9th Cir. 1989); Matter of Meyerland Co., 960 F.2d 512 (5th Cir. 1992), cert. denied, U.S. , 113 S.Ct. 967, 122 L.Ed.2d 124; Istituto Per Lo Sviluppo Economico Dell' Italiaa Meridionale v. Sperti Prods. Inc., 47 F.R.D. 310 (D.C.N.Y. 1969); Madron v. Thomas, 38 F.R.D. 177 (D.C. Tenn. 1965); Murphy v. E.I. DuPont De Nemours & Co., 26 F.Supp. 999 (D.C. Penn. 1939); Borton v. Connecticut Gen. Life Ins. Co., 25 F.Supp. 579 (D.C. Neb. 1938). See also Recchion v. Kirby, 637 F.Supp. 284, 289 (WD Pa. 1985). (Pennsylvania state procedure in derivative action did not require have particularity requirement of FRCP 23.1. Once the case was removed to Federal Court "plaintiff should be accorded an opportunity to bring his pleading into conformity with the rule." Recchion, supra, citing 7A Wright & Miller Federal

Practice & Procedure Section 1824 at 312 (1972)).

The position of the Fifth Circuit Court of Appeals on this case is:

> A case removed from state court simply comes into the federal system in the same condition in which it left the state system. Granny Goose Foods, Inc., v. Brotherhood of Teamsters, Etc., 415 U.S. 423, 435-436, 94 S.Ct. 1113, 1122-23, 39 L.Ed.2d435 (1974). For instance, if the notice of appeal was adequate in the state court system, it should be deemed adequate when it enters the federal courts, regardless of whether the state technical requirements for notice of appeal differ from the federal. Granny Goose, 415 U.S. at 435-36, 94 S.Ct. at 1122-23.

Matter of Meyerland, supra, 960 F.2d at 520.

Therefore under Granny Goose, Meyerland, and Lally since the District Court did not order the Petitioners to replead nor did any defendant request such a repleading, then the complaint should be "deemed adequate when it enters the federal courts, regardless of whether the state technical requirements" for a specific pleading is different from the federal. The District Court then dismissed the state court complaint on the basis that it did not comply with Federal Rules of Civil Procedure 9(b). The Second Circuit affirmed that ruling.

To allow dismissal of state court complaints, appeals and other pleadings removed to federal court because they did not meet the technical requirements of federal procedure when filed in state court prior to removal would be contrary to Rule 81(c), Granny Goose, supra, and Meyerland, supra, Lally, supra, (and other cases cited herein). Therefore, the Supreme Court should grant certiorari on this issue or reverse and remand this case back to the Second Circuit on the basis of Granny Goose, supra, pursuant to the Supreme Court's Rule 10.1(c).

III. DOES THE REVES V. ERNST & YOUNG, _____ U.S. _____ 1113 S.Ct 1163 (1993) MANAGEMENT AND CONTROL STANDARD FOR SECTION 1962(c) CASES APPLY TO 1962(b) CASES.

On March 3, 1993, the Supreme Court handed down Reves v. Ernst & Young, _____ U.S. _____, 113 S.Ct. 1163 (1993), a case pronouncing the Supreme Court's interpretation of the word "conduct" as used in 18 USC Section 1962(c). On June 21, 1993, the Second Circuit handed down this decision using the Reves definition of "conduct" to hold that an "outsider", as the defendants were alleged to be in this matter,

did not engage in "unlawful conduct" under Section 1962(b).

This case, therefore, presents to this Court the opportunity to tell the Circuits whether, in fact, Reves management and control test is confined to Section 1962(c) or whether the Reves management and control standard applies to Section 1962(b) cases. Having adopted Reves standard for Petitioners' Section 1962(b) claim, the Second Circuit concludes that the "Plaintiffs failed to come forward with evidence that could support their assertions of unlawful conduct."

The Second Circuit's reliance on Reves to evaluate plaintiffs Section 1962(b) claims ignores the holding in Reves which specifically stated that Section 1962(c) analysis and its application to "insiders" did not apply to Section 1962(b) claims and its application to "outsiders". The Supreme Court specifically stated in Reves:

> Infiltration of legitimate organizations by "outsiders". . is clearly addressed in subsections(a) and (b), and the "operation or management" test that applies under subsection(c) in no way limits the application of subsections

> (a) and (b) to "outsiders". Second, Section 1962(c) is limited to persons "employed by or associated with" an enterprise, suggesting a more limited reach than subsections (a) and (b), which do not contain such a restriction. Third, Section 1962(c) cannot be interpreted to reach complete "outsiders" because liability depends on showing that the defendants conducted or participated in the conduct of the "enterprise's affairs," not just their own affairs. Of course, "outsiders" may be liable under Section 1962(c) if they are "associated with" an enterprise and participate in the conduct of its affairs - that is, participate in the operation or management of the enterprise itself - but it would be consistent with neither the language nor the legislative history of Section 1962(c) to interpret it as broadly as petitioners and the United States urge.

113 S.Ct. at 1173.

The Supreme Court should grant certiorari and to clarify that Reves does not apply to Section 1962(b) cases. Clearly, the Supreme Court should not allow this direct conflict between the holding in Reves and the Second Circuit's holding in this case. Therefore, certiorari should be granted under Supreme Court Rule 10.1(c). Alternatively, the Supreme Court should order a summary disposition reversing and remanding pursuant to Supreme Court Rule 16.1.

IV. ARE BANKERS EXEMPT FROM RICO?

Another issue of national importance presented by

this petition is whether RICO applies to bankers. The Second Circuit cites the Eighth Circuit in Terry A. Lambert Plumbing, Inc. v. Western Security Bank, 934 F.2d 976, 981 (8th Cir. 1991) for the position: "Bankers do not become racketeers by acting like bankers." Again, Reves is used by the Second Circuit along with Terry A. Lambert Plumbing, supra, to give credence to its position that Congress intended to immunize bankers from a Section 1962(b) claim. There is no exemption that the Petitioners are aware of in the RICO legislative history to exempt bankers from RICO claims. There is nothing in the RICO statute itself that specifically exempts bankers from RICO. In fact, such an exemption is contrary to the RICO "liberal construction" clause which provides that the "provisions of this title should be liberally construed to effectuate its remedial purposes." Reves, supra, 113 S.Ct. at 1172.

Other circuits have held that bankers can be liable under Section 1961, e.g. Morgan v. Bank of Waukegan, 804 F.2d 970 (7th Cir. 1986); NCNB National Bank of North Carolina v. Tiller, 814 F.2d 931 (4th

Cir. 1987); Quick v. Peoples Bank of Cullman County, 993 F.2d 793 (9th Cir. 1993).

In Morgan v. Bank of Waukegan, 804 F.2d 970 (7th Cir. 1986), the Court held that a scheme where a bank and another defendant sought to systematically strip a borrower of its assets through debt collection proceedings, which involved the use of mails, was a sufficient basis to establish a RICO violation under Section 1962. (Those are the factual allegations made by the Petitioners in this case).

In NCNB National Bank of North Carolina v. Tiller, 814 F.2d 931 (4th Cir. 1987), the Fourth Circuit held that lender conduct constitutes acquisition or maintenance of an interest in or control of a borrower's business within the meaning of 18 USC Section 1962(b) if the bank could be found to engage in:

> Actual day-to-day involvement in management and operations of the borrower or ability to compel the borrower to engage in unusual transactions.

814 F.2d at 936. (These were the factual allegations made by the Rytmans)

In Quick v. Peoples Bank of Cullman County, 993

F.2d 793 (CA9 1992), the Ninth Circuit held that a bank could be liable for the RICO Section 1962(b) violations of one of its bankers.

There is nothing in the legislative history nor in the rulings of the Supreme Court to date, including Reves cited by the Second Circuit, that would immunize or exempt "bankers" from RICO and the Supreme Court should resolve this conflict under Rule 10.1(a).

V. ALLEGATIONS OF STATE CRIMINAL EXTORTION CONSTITUTES PREDICATE ACTS UNDER RICO

This case presents an issue of national importance as to whether allegations of state criminal acts can constitute predicate acts under RICO.

The Petitioners plead violations of Connecticut General Statutes ("C.G.S.") Section 53a-119 et seq. (The Connecticut extortion and larceny statute). The Second Circuit refused to recognize these allegations as predicate acts under 18 U.S.C. Section 1961(1)(A).

The RICO statute specifically states:

As used in this chapter -

(1) "racketeering activity" means (A) any act or threat involving robbery, bribery, and extortion which is chargeable under State law and punishable by imprisonment for more than one year.

The Connecticut extortion part of C.G.S. Section53a-119 provides in relevant part:

Extortion. A person obtains property by extortion when he comples or induces another person to deliver such property to himself or a third person by means of instilling in him a fear that, if the property is not so delivered, the actor or another will: *** (B) cause damage to property; or (C) engage in other conduct constituting a crime; or (D) accuse of some person of a crime or cause criminal charges to be instituted against him; or (E) expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; ***

(N.b. C.G.S. 53a-122 through 124 sets the prison time for the criminal offenses under Section 53a-119(5) based upon the value of the property extorted or acquired. Property valued in excess of $1,000.00 constitutes a Class D Felony which is punishable by imprisonmnet not less than one year nor more than five years. C.G.S. Section 53a-35a. The enterprises assets acquired and sought to be acquired by the defendants in this matter were worth millions of dollars.)

For example, the Petitioners have plead, in detail, how the Kofkoffs called Julius Rytman on the phone and told him that if Julius did not cooperate with the Kofkoff's efforts to acquire Petitioners' enterprise interests, Kofkoff would create environmental problems on Petitioner's farms that would result in Petitioner's arrest under Connecticut Intense Poultry Act, C.G.S. Sec. 22-323a-2, et seq., a Connecticut criminal statute. In response to this threat on Kofkoffs' part to commit a crime to compel or induce Petitioner to turn over enterprise's interests so Kofkoff could acquire them, Mr. Rytman told the Kofkoff "to go to hell". At that point, the Kofkoffs proceeded to lay off people who controlled the removal of chicken manure on a farm owned by the Petitioner (but now controlled by Kofkoff), brought dead chickens from one farm and then onto that farm in violation of criminal statutes. The accumulation of manure and dead chickens attracted flies, rodents, and ultimately media attention, and resulted in a warrant issued for Petitioner's arrest. This extortionate conduct was one of the acts that forced

the Petitioners to their knees so that they were compelled and induced to consent to selling the enterprise's assets worth millions for a fraction of its value. Amended Complaint Appendix A1, pp. 97-108. This is just one graphic example of many extortionate acts pled.

The failure of the Second Circuit to address Petitioners Connecticut extortion claims as RICO predicate acts is in direct conflict with 18 U.S.C. Section 1961 (1)(A) and is in conflict with the Fourth Circuit in Battlefield Builders, Inc. v. Swango, 743 F.2d 1060, 1068 (4th Cir. 1984). ("We think that plaintiff alleged extortion under Virginia law and a second series of acts constituting attempted extortion under Virginia Law so that plaintiffs did allege a cause of action which is immune to a Rule 12 motion to dismiss".)

The Supreme Court should resolve this conflict and grant certiorari pursuant to Rule 10.1(a).

VI. THIS COURT SHOULD RESOLVE THE CONFLICT AS TO WHETHER THE THREAT TO ENFORCE LEGAL OR CONTRACT RIGHTS BETWEEN PARTIES CAN CONSTITUTE A HOBBS ACT VIOLATION

This decision brings the Second Circuit directly into a nationwide debate as to whether the threat to enforce by legal rights can ever be the basis for Hobb Act violations.

HOBBS ACT VIOLATIONS IN THE BUSINESS CONTEXT

The Hobbs Act, 18 U.S. Section 1951 (extortion and attempted extortion), provides in relevant part:

> (a) Whoever in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section - . . . .
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under the color of official right.

Judicial construction in the circuit court of the Hobbs Act has not limited the Act's reach to paradigmatic racketeering activities; to the contrary, the reach of the Hobbs Act has been extended to a broad range of conduct far different from the classic case of extracting money by threats

or infliction of physical harm. To establish a violation of section 1951, the plaintiffs must prove three elements: (1) that the defendants induced or attempted to induce his victim to part with property; (2) that they did so by "extortion"; and (3) that interstate commerce was delayed, interrupted, or adversely affected (or that would have been the result had the defendants' efforts succeeded). See Devitt and Blackmar, Federal Jury Practice and Instructions, Sections 56.01 & 56.04; Pattern Jury Instructions, #46, Criminal Cases, Eleventh Circuit (1985). The "property" element includes intangible as well as tangible property, including "the right ... to make a business decision free from outside pressure wrongfully imposed." United States v. Santoni, 585 F.2d 667, 673 (4th Cir. 1978), cert. denied, 440 U.S. 910, 99 S.Ct. 1221, 59, L.Ed.2d 459 (1979); see United States v. Zemek, 634 F.2d 1159, 1174 (9th Cir. 1980), cert. denied, 450 U.S. 916, 101 S.Ct. 1359, 67 L.Ed.2d 341 (1981). The plaintiffs can satisfy the extortion element by proof of the "use of fear," which is not limited to fear of force or

violence - fear of economic harm is prescribed as well. See United States v. Kattar, 840 F.2d 118, 123 (1st Cir. 1988); United States v. Cusmano, 659 F.2d 714, 715 (6th Cir. 1981) (Cusamo I), cert. denied, 467 U.S. 1252, 104 S.Ct. 3536, 82 L.Ed. 2d 841 (1984); Zemek, 634 F.2d at 1174. The fear of economic harm, though, must be "actual and reasonable and [the] defendant [must know] and intentionally ... use ... such actual fear." Cusmano, supra, 659 F.2d at 715. The Act covers explicit as well as implicit threats. See United States v. Duhon, 565 F.2d 345, 351 (5th Cir.), cert. denied, 435 U.S. 952, 98 S.Ct. 1580, 55 L.Ed.2d 802 (1978). Hall American Center Associates v. Dick, 726 F.Supp. 1083, 1093-94 (E.D.Mich. 1989).

The Second Circuit held as a matter of law in this case:

> Allegations that a mortgagee "threatened to foreclose" on certain properties, or that a collateralized lender demanded delivery of the collateral in satisfaction of a defaulted loan do not suffice to allege extortion within the meaning of the Hobbs Act.

The Second Circuit made this finding in face of

Petitioners' clear factual allegations that the defendants were not entitled to foreclose and were not entitled to the collateral. This issue has been sometimes referred to as the "claim of right" doctrine or defense to Hobbs Act violations and has its origin in part in the case of United States v. Emmons, 410 U.S. 396 (1973). In Emmons, the Supreme Court held (5-4 majority) that the Hobbs Act did not prohibit employees' use of violence to obtain legitimate union objectives, such as higher wages in return for services desired by an employer.

Emmons, was immediately interpreted by many Courts of Appeals to apply only to labor cases. U.S. v. Agnes, 753 F.2d 293 (3rd Cir. 1985); United States v. Zappola, 677 F.2d 264, 268-270 (2d Cir. 1982), cert. denied, 459 U.S. 866 (1982); United States v. Porcaro, 648 F.2d 753, 760 (1st Cir. 1981); United States v. French, 628 F.2d 1069, 1075 (8th Cir.), cert. denied, 449 U.S. 956 (1980); United States v. Warledo, 557 F.2d 721, 728-30 (10th Cir. 1977).

The Supreme Court recently in McCormick v. United States, U.S. , 111 S.Ct. 1087 (1991)

dealt with the "under color of official right" language of the Hobbs Act as it applied to public officials. However, McCormick appears to clearly limit its holding to public officials.

The position of the Second Circuit in this case is in conflict with the language of the Act, with other Circuits (namely, the First, Third, Sixth, and Seventh) and with the general holdings of the Supreme Court.

The Hobbs Act provides a precise definition of extortion and Congress intended "to make punishable all conduct falling within the reach of the statutory language". United States v. Culbert, 435 U.S. 371, 377, 98 S.Ct. 1112, 1116 (1978). The Hobbs Act manifests Congressional intent "to use all of the constitutional power [it had] to punish interference with interstate commerce by extortion, robbery or physical violence." Stirone v. United States, 361 U.S. 212, 215, 80 S.Ct. 270 (1970).

Based upon the above, Supreme Court decisions and the First Circuit, have found Hobbs Act violations in the commercial lending context. U.S. v. Strum, 870

F.2d 769 (1st Cir. 1989). In Strum, the creditors fear of non-payment was a sufficient basis for maintaining a Hobbs Act violation.

The First Circuit held that a threat to sue may constitute extortion under the Hobbs Acts if "she [defendants] know she had no claim to the property that she allegedly sought to extort." Id., 774. The First Circuit noted that even though most "defendants will claim that they thought they were legally entitled to the property they extorted. The fact finder is not obligated, however, to believe these claims." Id., 774 n.6. Therefore, summary judgment would be improper.

The First Circuit's position was adopted by a district court in the Sixth Circuit in a commercial setting involving threats to exercise legal rights and actually exercising them. In the case of Hall American Center Associates Limited Partnership v. Dick, 726 F.Supp. 1083 (E.D. Mich. 1989), the Court found, as a matter of law, a sufficient RICO claim based upon Hobbs Act claims.

The extortionate activity allegedly engaged in by

> the defendants was their attempt to obtain the plaintiffs' Property, with the plaintiffs' consent, but induced by their wrongful use of actual or threatened fear of economic harm should the Property not be sold on the defendants' terms. The economic harm appears to be the termination of the Joint Venture, resulting in the continuation of the mortgage default, the continuation of significant interest payments, the loss of profits expected from the venture, the potential loss of the Property, as well as the inability to deal with lenders, buyers, and joint venture partners along with public officials, necessary to the development of the land ***. The economic harm allegedly resulted from the defendants' lawsuits and notices of lis pendens, along with the defendants' letters, threats, and communications to various third parties concerning the property.

Hall American Center Associates Limited Partnerships Dick, 726 F.Supp. at 1094. Similar facts were plead by the Petitioner in their complaint, amended complaint and in their submissions in opposition to the summary judgment

The Third Circuit in U.S. v. Agnes, 753 F.2d 293 (3rd Cir. 1985) held that even if a defendant has a claim of right to the property being acquired that there was no general claim of right defense to the Hobbs Act under federal law. The Third Circuit went on to hold that the defendant could not make a claim of right defense under state law involving his rights

in a partnership dissolution.

The Seventh Circuit in Shields Enterprises, Inc. v. First Chicago Corp., 975 F.2d 1290 (7th Cir. 1992), the defendants' claimed that they could not be held liable in a Civil RICO suit based upon the Hobbs Act where the defendants, in a commercial setting, had contractual and statutory rights to make the alleged threats. The Seventh Circuit held that the threats the defendants made to coerce plaintiff into doing certain actions could violate the Hobbs Act if the threats were in violation of a common law or statutory right of the plaintiff. Id. at 1297. The Seventh Circuit remanded the matter back to the District Court to analyze the claim in light of the common law governing the relationship between the parties to see if it had been breached by the defendants.

The District Court did analyze the claim upon remand and found Hobb's Act extortion. Shields' Enterprises, Inc. v. First Chicago Corp., 1993 WL 408358 (N.D. Ill. 10/8/93). The Court found that the defendants had the contractual right to issue

additional stock, but not to issue additional stock at an allegedly inadequate or unfair price. Therefore, the threat to issue the stock under these circumstances was a Hobbs Act violation. 1993 WL408358, p. 4.

Under the Seventh Circuit Shields' analysis, the Circuit Court has to go further than just finding that a mortgagee threatened to foreclose or that a collateralized lender demanded delivery of the collateral. The Court must analyze to see if the "threat" and/or "demand" violated other common law or statutory law or was beyond the rights of the mortgagee or collateralized lender under the particular facts. In this case, the Petitioners plead violations of their common law rights.

VII. ALLEGATIONS THAT A MORTGAGE "THREATENED TO FORECLOSE" ON CERTAIN PROPERTIES OR THAT A COLLATERALIZED LENDER DEMANDED DELIVERY OF THE COLLATERAL IN SATISFACTION OF A DEFAULTED LOAN CAN "CONSTITUTE ACQUISITION OR MAINTENANCE OF AN INTEREST IN OR CONTROL OF A BORROWER'S BUSINESS WITHIN THE MEANING OF 18 USC SECTION 1962(b)"

Other circuits do not agree with this position taken by the Second Circuit. Sutliff, Inc. v. Donovan Companies, 727 F.2d 648 (7th Cir. 1984)

(citing U.S. v. Crocket, 534 F.2d 589) (5th Cir. 1976).

The conduct set forth in Petitioners' pleadings is similar to the conduct found to be a violation of 18 USC Section 1962(b) in Sutliff, Inc. v. Donovan Companies, 727 F.2d 648 (7th Cir. 1984).

In Sutliff, the plaintiffs, owners, operated a business that generated two million dollars a year in sales. The company got into financial trouble which precipated one plaintiff owner into "a state of hysteria, physical and mental exhaustion ..., a state of substantially diminished mental responsibility, panic and fear ..." Id. at 651. The defendants took advantage of her mental state to sell her product below cost which it resold at a profit. The defendants made small advances to the plaintiff owner that persuaded plaintiff guarantors that the plaintiff owners were solvent and the plaintiff guarantors continued to extend credit to the plaintiff company. The plaintiff guarantors were left "holding the bag" when the plaintiff company collapsed.

> The plaintiffs described this scheme of milking a company dry and leaving its creditors with uncollectible accounts receivable as a "bustout", on which see, e.g., United States v. Crockett, 534 F.2d 589, 592 (5th Cir. 1976), and contend that when the perpetrators of a bust-out use the mails and telephone as Donovan and Garrow are alleged to have done, they have committed federal mail and wire fraud, which are among the crimes that the RICO statute defines as "racketeering" offenses.

727 F.2d at 651. Similarly, the Petitioners described a scheme of milking or stripping the Petitioners enterprise of assets leaving the Petitioners enterprise of assets leaving the Petitioners and its other creditors without assets. The defendants effectively "busted out" the assets of the Petitioners enterprise. The Petitioners also alleged similar hysteria, physical and mental exhaustion.

The Seventh Circuit held that these allegations constituted valid allegations of Section 1962(b). In this regard, the Court noted:

> The Complaint also alleges that the defendants acquired control of Sutliff by means of a fraud. As control within the meaning of the statute need not be formal - need not be the kind of control that is obtained, for example, by acquiring a majority of the stock of a corporation. See United States v. Jacobson, 691 F.2d 110, 112 (2d

Cir. 1982).

Id. 653.

The Seventh Circuit also held that these allegations constituted valid allegations of Section 1962(c). In this regard, the Court noted: The Complaint also describes the defendants as having "associated with" Sutliff and conducted its affairsby means of the fraud; and if, as these allegations imply, the defendants infiltrated Sutliff and used it as a tool to defraud it and the other defendants, Section 1962(c) was violated. Finally, the Circuit Court held that "the allegation that the defendants conspired to violate the previous subsections is a good violation of Section 1962(d). 727 F.2d at 653-654. Therefore, based upon Sutliff the Dfts. violated "b", "c", and "d".

Additionally, the Circuit Court's decision discussed under the Hobbs Act Violations in the Busines Context, supra, and Are Bankers Exempt from RICO, supra, are in conflict with the position taken by the Second Circuit.

VIII. THE SECOND CIRCUIT IGNORED PETITIONERS RICO CLAIMS AGAINST THEIR ATTORNEY AND ALLEGATIONS SPANNING OVER TWO YEARS

The Second Circuit failed to address Petitioners' RICO claim against his attorney, Jacobson, RICO claims against Kofkoff other then the lending claim. All claims were limited to the District Court analysis from February 1987 to November 1987, which the Second Circuit affirmed. The original Complaint and Amended Complaint allegations begin in 1984 and run through the date of filing (and alleges a continuation of wrongful conduct). (See also section on state law extortion claims).

This refusal to consider all of the allegations is is conflict with the long established rules of the Supreme Court. All allegations pled must be reviewed and considered in the light most favorable to the Plt. prior to granting a Motion to Dismiss. H.J., Inc. v. Northwestern Bell Telephone Company, 492 U.S. 229, 249-250 (1989); Hishon v. King & Spaulding, 467 U.S. 69, 69, 703 (1984); Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Swistock v. Jones, 884 F.2d 755, 759 (CA3

1989).

In Swistock v. Jones, 884 F.2d 755 (3rd Cir. 1989), the Court, 3rd Cir., applying H.J., Inc., supra, held:

> "The complaint alleged numerous acts of wire and mail fraud over a period of approximately 14 months for the purposes of inducing plaintiffs into entering into a leasing transaction and to continue to induce plaintiffs to pay under the lease. The complaint alleges (although did not separately identify as predicate acts) further representations made by the defendants in connection with negotiations for a settlement agreement which the parties ultimately signed. Plaintiffs also alleged that they were improperly billed pursuant to a separate agreement."

884 F.2d at 759. The District Court limited its analysis to the last 4 months leading up to the lease agreement (just as the D.Ct. here only dealt with facts after the default and through the "work-out agreement"). The Circuit Court held that in determining the predicate acts, all of the allegations must be considered and found a RICO claim. Therefore, the Suprme Court should grant certiorari and correct the Second Circuit in line with the Supreme Court's own decisions and the Third Circuit.

IX. THE SECOND CIRCUIT DISREGARDED AUTHORITY REQUIRING FULL DISCOVERY PRIOR TO GRANTING A MOTION FOR SUMMARY JUDGMENT

This case presents an opportunity for this Court to consider the standards to be applied when a Court denies a party the right to conduct discovery,without explanation, prior to acting on a motion for Summary Judgment.

Does the fact that discovery had been (and was still) ongoing for a period of time create a basis for moving forward on a Motion for Summary Judgment before discovery is complete? Consideration of a Summary Judgment motion is proper only after there has been an adequate time for discovery. Celotex Corp. v. Catrett, 477 U.S. 317, , 91 L.Ed.2d 265, 273, 106 S.CT. 2548, 2552-53 (1986); Snook v. Trust Co. of Georgia Bank of Savannah, 859 F.2d 865, 870 (11th Cir. 1988) citing e.g., Littlejohn v. Shell Oil Co., 488 F.2d 1140, 1145 (5th Cir. 1973) (en banc), cert. denied, 414 U.S. 1116, 94 S.Ct. 849, 38 L.Ed.2d 743 (noting the high fatality rate of summary dispositions at a time before the facts have been fully developed); Alabama Farm Bureau Mutual Casualty

Co. v. American Fidelity Life Insurance Company, 606 F.2d 602, 609 (5th Cir. 1979), cert. denied, 449 U.S. 820, 101 S.Ct. 77, 66 L.Ed.2d 22 ("Summary Judgment should not, therefore, ordinarily be granted before discovery has been completed).

> The party opposing a motion for summary judgment has a right to challenge the affidavits and other factual materials submitted in support of the motion by conducting sufficient discovery so as to enable him to determine whether he can furnish opposing affidavits. Parrish v. Board of Commissioners of the Alabama State Bar, 533 F.2d 942, 948 (5th Cir. 1976). If the documents or other discovery sought would be relevant to the issues presented by the motion for summary judgment, the opposing party should be allowed the opportunity to utilize the discovery process to gain access to the requested materials. Id. Generally summary judgment is inappropriate when the party opposing the motion has been unable to obtain responses to his discovery requests. Cowan v. J.C. Penney Company, Inc., 790 F.2d 1529, 1532 (11th Cir. 1986).

Snook, supra, 859 F.2d at 870. In the instant case, as in the Snook case, the Petitioners brought the issue of inadequate discovery to the District Court's attention. In a scheduling conference prior to responding to summary judgment, the District Court denied the discovery requests. The Eleventh Circuit in Snook, supra, stated:

> [T]he whole purpose of discovery in a case in which a motion for summary judgment is filed is to give the opposing party an opportunity to discover as many facts as are available and he considers essential to enable him to determine whether he can honestly file opposing affidavits.

Snook, supra, 859 at 871, citing, Parrish, supra, 533 F.2d at 948.

Further, the Third Circuit

> "has criticized the practice of granting summary judgment motions at a time when pertinent discovery requests remain unanswered by the moving party:
>
> [W]e have said where the facts are in possession of the moving party a continuance of a motion for summary judgment for purposes of discovery should be granted almost as a matter of course. Ward v. United States, 471 F.2d 667, 670-71 (8 Cir. 1978)... [B]y acting on the motion for summary judgment without argument, and without reference to what might be developed in discovery, which was being diligently pursued, the court erred. Costlow v. United States, 552 F.2d 560, 564 (3d Cir. 1977)".

Sames v. Gable, 732 F.2d 49, 51 (3d Cir. 1984). See also, Burnside-Ott Aviation Training Center, Inc. v. U.S., 985 F.2d 1574, 1582 (9th Cir. Fed. 1993) (holding summary judgment should be refused where the moving party has not had opportunity to discover information that is essential to its opposition); Dean v. Barber, 951 F.2d 1210 (11th Cir. 1992)

(record did not include a finding by the court that the discovery was complete); Secretary of Labor, U.S. Dept. of Labor v. Burger King Corp., 955 F.2d 681 (11th Cir. 1992) (not proper for the district court to consider a motion for summary judgment while ...two discovery motions were pending); Miller v. Beneficial Management Corp., 977 F.2d 834, 846 (3rd Cir. 1992) (abuse of discretion to deny postponement of ruling on summary judgment pending completion of discovery where party could have read the court's order to imply that formal affidavits would not be required and party asked for postponement until critical discovery completed).

A party must be given the right to conduct discovery prior to Summary Judgment if he so requests an order "to permit affidavits to be obtained or depositions to be taken or discovery to be had", FRCP 56(f). The Petitioners should have been permitted to complete discovery of "potentially favorable information", even though previous discovery had been conducted. Schering Corp. v. Home Insurance Co., 712 F.2d 4, 10 (2d Cir. 1983). (In Schering, the fact

that over 74,000 pages of documents were produced did not warrant a denial of additional discovery prior to acting on a summary judgment motion).

The record clearly establishes that the Petitioner requested discovery prior to the ruling on the Rule 56 Motion and was denied the opportunity to conduct discovery by the District Court, without any explanation. All parties were seeking discovery at the time the District Court rendered its decision. The Petitioners did not have a full opportunity to conduct discovery therefore this Second Circuit ruling is contrary to Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 2514, 91 L.Ed.2d 202 (1986).

In an affidavit signed by Petitioner's attorney and filed with the District Court, the following facts were presented and uncontested (Appendix A-29-A38 which is part of this booklet). After plaintiffs filed their RICO Statement, the defendants challenged the plaintiffs' Complaint by way of Motions to Dismiss. Eight days later on June 3, 1992, NSS filed a Motion for Summary

Judgment. Discovery had been basically suspended while the District Court dealt with the remand issue - namely from December 12, 1991 - April 1992. (The lawsuit was commenced on November 2, 1991). It had been understood by the parties at a status conference in January of 1992 that the discovery time table would be set at a status conference after the Motion to Remand was decided, this status conference was held on July 9, 1992.

At the July 9, 1992 conference, the plaintiffs sought discovery prior to responding to NSS summary judgment and, in particular, sought to depose the affiant of the NSS affidavit. Crucial were issues raised by the new "facts" sworn to by the NSS affiant. It was the Petitioners' position was that NSS affidavit was false (hereinafter "NSS False Affidavit"). Petitioners needed to conduct discovery on factual issues raised by the Summary Judgment motion and particularly the examination of the issues raised on NSS False Affidavit. This discovery clearly was directed to the matters raised by NSS' summary judgment motion, therefore, it was improper

for the District Court to proceed. Opryland U.S.A., Inc. v. Great American Music Show, 970 F.2d 847 (D.C. Cir. 1992) ("when discovery is reasonably directed to 'facts essential to justify the party's opposition', in the words of Rule 56(b) such discovery must be permitted or summary judgment refused.") (emphasis supplied) quoting footnote 5 of Anderson v, Liberty Lobby, Inc., 477 U.S. 242, 250 n.5 (1986).

The Supreme Court in Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 n.5 (1986) clearly states that "where the non-movant to a summary judgment motion has not had the opportuity to discover information that is essential to his opposition then "summary judgment be refused." (emphasis supplied).

The District Court refused to allow discovery. Instead, the District Court stated to Petitioner's counsel, at the status conference, to just have Petitioner swear to the RICO Statement (which Rytman did) and use whatever proof they had at that point and if they got "caught with their pants down", then file a Motion to Reconsider so that further work could be done to prepare Petitioner's case. In

reliance upon this statement from the District Court, the Petitioners proceeded to respond to the summary judgment motion. The District Court relied on NSS False Affidavit in granting NSS Motion for Summary Judgment, and denied Petitioner's post judgment motions to reconsider. The Petitioners raised this issue clearly in its Rule 60 Motion and Affidavit In Support thereof. The affidavit recited the facts above and provided in relevant part:

> 7. That a misunderstanding may have resulted from a chambers conference with the Honorable Peter Dorsey, Federal District Court Judge and the presiding Judicial Officer Murphy on July 9, 1992 or as a result of said conference a mistake, inadvertise, or excusable neglect occurred as a result of said conference.

Para. 7 Rytmans' Affidavit in Support of Rule 60(6) Motion. (App. A36-A37 at the end of this book). Defendants did not file any counter affidavit or objection to this motion. The motion should have been granted. The District Court denied it without comment. The Petitioners' appealed this decision and the Second Circuit never addressed the Rule 60 motion issue. This position of the Second Circuit not to allow relief from judgment conflicts with the Ninth

Circuit position in Torres v. S. S. Pierce Company, 471 F.2d 473 (9th Cir. 1973), and the Federal Circuit position on Griffin v. Kennedy, 344 F.2d 198 (D.C. Cir. 1965) The Summary Judgment Motion should not have been granted and once granted, then the post judgment motions including the Rule 60b Motion filed by Petitioners should have been granted. Sames v. Gable, 732 F.2d 49, 51 (3rd Cir. 1984) and other cases cired herein.

The District Court never made a finding that discovery was complete. In fact no such finding could be made, as discovery by some of the parties was not completed in Federal Court and was still going in State Court. Summary Judgment should not be granted until the party opposing the motion has had an adequate opportunity for discovery particularly to address the revisions raised by NSS False Affidavit. (N.b. The District Court never found that the factual issue in the State Court action were the same as the RICO action. Therefore, any effort to bootstrap the State Court discovery into this case has no legitimate basis absent such a finding).

CONCLUSION

For the reasons stated, the Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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91cv1146

DORSEY

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

- - - - - -

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-first day of June one thousand nine hundred and ninety-three.

Present: HONORABLE AMALYA L. KEARSE,
HONORABLE GEORGE C. PRATT,
HONORABLE ROGER J. MINER,
Circuit Judges.

(Filed June 21, 1993)

JULIUS RYTMAN, DORA RYTMAN, COLCHESTER EGG FARMS, INC., RYTMAN GRAIN, INC., JULIUS & DORA RYTMAN PROPRIETORSHIP, PINECREST DUCK FARM TRUST, AGRI-FINANCE, INC.,

Plaintiffs-Appellants,

- v. - Nos. 93-7061

-7177

KOFKOFF EGG FARM LIMITED PARTNERSHIP, SAMUEL KOFKOFF, ROBERT KOFKOFF, JOSEPH FORTIN, BLAIR HAGY, COLCHESTER FOODS, INC., CONNECTICUT NATIONAL BANK, NORWICH

Rytman v. Kofkoff Egg Farm Limited Partnership, Nos. 93-7061, -7177

SAVINGS SOCIETY, FITCHVILLE REALTY, INC., BROWN, JACOBSON, JEWETT & LAUDONE, P.C., now known as Brown, Jacobson, Tillinghast, Lahan & King, P.C., MILTON L. JACOBSON, GLENN GORDON, PIERCE HOLLOW FARMS, INC.,

Defendants-Appellees

Appeal from the United States District Court for the District of Connecticut.

This cause came to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is not hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

Plaintiffs Julius Rytman et al. (collectively "Rytman") appeal from a judgment entered in the United States District Court for the District of Connecticut, Peter C. Dorsey, Judge, dismissing their claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. Section 1962, against defendant The Norwich Savings Society ("Norwich") pursuant to Fed. R. Civ. P. 56 and against teh other defendants pursuant to Fed.R. Civ. P. 12(b)(6) and Fed. R. Civ. P. 9(b). On appeal, plaintiffs challenge every aspect of the court's rulings, including the court's denial of their motion to remand to state court after rmeoval, and they contend that at least they should have been allowed to amend their complaint. For the reasons below, we disagree.

To state a RICO cause of action, a plaintiff must allege "(1) that the defendant (2) through the commission of two or more acts (3) constituting a 'pattern' (4) of 'racketeering activity' (5) directly

or indirectly invests in, or maintains an interest in, or participates in (6) an 'enterprise' (7) the activities of which affect interests commerce." Moss v. Morgan Stanley, Inc., 719 F.2d 5, 17 (2d Cir. 1983), cert. denied, 465 U.S. 1025 (1984). For an individual defendant's conduct to have constituted a "pattern of racketeering activity," that defendant must have committed at least two racketeering acts constituting continuing criminal activity. 18 U.S.C. Section 1961(5); H.J. Inc v. Northwestern Bell Telephone Co., 492 U.S. 2229, 240 (1989).

Rytman's allegations do not meet these requiements. Through purporting to allege racketeering activity constituting violations of the Hobbs Act, 18 U.S.C. Section 1951, the complaint failed to plead any Hobbs Act violations. Allegations that a mortgagee "threatened to foreclose" on certain properties, or that a collateralized lender demanded delivery of the collateral in satisfaction of a defaulted loan do not suffice to allege extortion within the meaning of the Hobbs Act. Nor do such actions constitute acquisition or

maintenance of an interest in or control of a borrower's business within the meaning of 18 U.S.C. Section 1962(b).

Further, where the predicate acts of a RICO claim sound in fraud, the pleading of those acts must satisfy Rule 9(b)'s particularity requirements, specifying, inter alia, the statements that allegedly were false or misleading, the respect in whihc plaintiffs content the statements were fraudulent, and the purpose of the mailing within the defendant's allegedly fraudulent scheme. See McLaughlin v. Anderson, 962 F.2d 187, 190-194 (2d Cir. 1992). Conclusory statements such as "The conduct of the defendants involved the United States mail and interstate wires" (Complaint paragraph 10(mmmm) (1)), and "Colchester Foods, Inc., mailed through the Rytman v. Kofkoff Egg Farm Limited Partnership, Nos. 93-7061, -7177

United States mail the November 6, 1986 letter with fraudulent information relating to the Egg Supply Agreement" (Complaint paragraph 10 (hh) (1)), with not specification of either the representations

alleged to have been fraudulent or the respect in which they were alleged to have been false, are not sufficient.

We reject Rytman's contention that the district court was required to grant leave to amend the complaint. Though leave to file at least one amended pleading should normally be granted, see generally Foman v. Davis, 371 U.S. 178, 182 (1962); Oliver Schools, Inc. v. Foley, 930 F.2d 248, 253 (2d Cir. 1991); Fed R. Civ. P. 15(a); 3 Moore's Federal Practice paragraph 15.08[4], at 15-65 (2d ed. 1993), it is not an abuse of discretion to deny leave to amend where it appears that granting such permission is unlikely to be productive, see Foman v. Davis, 371 U.S. at 182 (denial not abuse of discretion where amendment would be futile). Thus, leave to amend may properly be denied "where . . . there is no merit in the proposed amendments, Health-Chem Corp. v. Baker, 915 F.2d 805, 810 (2d Cir. 1990); see also Ruffolo v. Oppenheimer & Co., 987 F.2d 129, 131 (2d Cir. 1992) (per curriam) (same), or where successive pleadings remain prolix and unintelligible, see, e.g., Prezzi

v. Schelter, 469 F.2d 691, 692 (2d Cir. 1972) (per curiam), cert. denied, 411 U.S. 935 (1973). Here, Rytman submitted to the court a proposed amended complaint, consisting of 121 pages (hardly the "short and plain" or "simple, concise, and direct" statement that Fed. R. Civ. P. 8(a) and (e) required), which the district court reviewed and concluded failed to cure the defects in the original complaint. This evaluation, and the conclusion that the proposed amendment would not be productive, did not constitute an abuse of discretion.

Nor, given the discovery already conducted over a

span of years in state-court proceedings involving these parties, was the court required to delay ruling on the present motions in order to permit Rytman to conduct additional discovery. See, e.g., Ruffolo v. Oppenheimer & Co., 987 F.2d at 131-32 (denial of leave to amend not abuse of discretion where plaintiff was a party to arbitration proceedings with one of the defendants for nearly two years, had

apparently unrestricted access to discovery, and had all of his discovery requests complied with); Billard v. Rockwell International Corp., 683 F.2d 51, 57 (2d Cir. 1982) (denial not an abuse of discretion where the plaintiff has had "access to full discovery" in a related case).

As to the summary judgment granted in Norwich's favor, absent from the record is any evidence from which an inference could be drawn that Norwich attempted to acquire or maintain an interest in Rytman's enterprise in an unlawful manner. The interest that Norwich acquired was one to which it was legally entitled--it owned a portion of a secured loan and merely sought to preserve its rights under that loan. See, e.g., Terry A. Lambert Plumbing, Inc. v. Western Security Bank, 934 F.2d 976, 981 (8th Cir. 1991) ("Bankers do not become racketeers by acting like bankers."); cf. Reves v. Ernst & Young, 1113 S.Ct. 1163, 1173 (1993) ("'[T]o conduct or participate directly or indirectly, in the conduct of [an] enterprise's affairs,' Section 1962(c), one must participate in the operation or management of the

enterprise itself."). Plaintiffs failed to come forward with evidence that could support their assertions of unlawful conduct. Accordingly, summary judgment was proper.

We have considered all of Rytman's contentions on this appeal and have found them to be without merit. The judgment of the district court is affirmed.

Rytman v. Kofkoff Egg Farm Limited Partnership, Nos. 93-7061, -7177

/s/ Amalya L. Kearse, U.S.C.J.

AMALYA L. KEARSE, U.S.C.J.

/s/ George C. Pratt, U.S.C.J.

GEORGE C. PRATT, U.S.C.J.

/s/ Roger J. Miner, U.S.C.J.

ROGER J. MINER, U.S.C.J.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

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DORSEY

MANDATE

UNITED STATES DISTRICT COURT OF APPEALS

FOR THE SECOND DISTRICT

- - - - - -

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-first day of June, one thousand nine hundred and ninety-three.

Present: HONORABLE AMALYA L. KEARSE,
HONORABLE GEORGE C. PRATT,
HONORABLE ROGER J. MINER,
Circuit Judges.

(filed June 21, 1993)

JULIUS RYTMAN, DORA RYTMAN, COLCHESTER EGG FARMS, INC., RYTMAN GRAIN, INC., JULIUS & DORA RYTMAN PROPRIETORSHIP, PINECREST DUCK FARM TRUST, AGRI-FINANCE, INC.,

Plaintiffs-Appellants,

- v. - Nos. 93-7061

-7177

KOFKOFF EGG FARM LIMITED PARTNERSHIP, SAMUEL KOFKOFF, ROBERT KOFKOFF, JOSEPH FORTIN, BLAIR HAGY, COLCHESTER FOODS, INC., CONNECTICUT NATIONAL BANK, NORWICH SAVINGS SOCIETY, FITCHVILLE REALTY, INC., BROWN, JACOBSON, JEWETT & LAUDONE, P.C., now known as Brown, Jacobson, Tillinghast, Lahan & King, P.C., MILTON L. JACOBSON, GLENN GORDON, PIERCE HOLLOW FARMS, INC.,

Defendants-Appellees.

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ISSUED AS MANDATE. 9/16/93

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

JULIUS RYTMAN, ET AL. :

-vs- :Docket No.

2:91CV01146(PCD)

KOFKOFF EGG FARM LIMITED :

PARTNERSHIP, ET AL. (Filed Sept. 3, 1992)

RULING ON PENDING MOTIONS

Plaintiffs, seven individuals or enterprises engaged in, inter alia, the egg farm and distribution business, grain business and other related businesses, allege violations of 18 U.S.C., Sections 1961-1968 (RICO). Defendants Connecticut National Bank, the "Kofkoff defendants" and the "Brown, Jacobson" defendants each move to dismiss. Additionally, defendant Norwich Savings Society moves for summary judgment.

BACKGROUND

The facts of this case, virtually impossible to glean or synthesize from the rambling narrative provided in the Complaint, are briefly summarized as follows. Plaintiff Julius Rytman and Dora Rytman

operated an egg farm and distribution business, as well as a grain mill. The Rytmans entered into several agreements with defendants Kofkoff Egg Farms Limited Partnership, Colchester Foods, and Fitchville Realty, all owned by defendants Robert Kofkoff, Samuel Kofkoff and Joseph Fortin, in which Colchester Foods agreed to buy the Rytmans' eggs. This agreement included a loan by Colchester to the Rytmans, secured by mortgages on some of the Rytmans' farms, as well as the Rytmans' chickens. CNB lent money to the Rytmans, secured by mortgages on the farms and the mill. Norwich Savings Society participated in one such mortgage with CNB. The defendant law firm, Brown, Jacobson, Jewett and Laudone, P.C., through principals Milton Jacobson and Glenn Gordon, represented the Rytmans until the events giving rise to this cause of action transpired.

By 1987, the plaintiffs were apparently in default on all of their loans. After Colchester Foods took possession of its collateral, in February of that year, plaintiffs and their debtors agreed to a work-out proposed by defendant Attorney Jacobson by

which the debt would be satisfied by distribution of their assets. In October of 1987, plaintiffs obtained new counsel and renounced the agreement. CNB thereupon filed a foreclosure action in state court, followed by a series of counter-suits by the Rytmans against all defendants.

DISCUSSION

A motion to dismiss involves a determination as to whether plaintiff has stated a claim upon which relief may be granted. That standard is more fully detailed in Fischman v. Blue Cross Blue Shield, 755 F.Supp. 528 (D. Conn. 1990).

Plaintiff's federal claim is articulated pursuant to 18 U.S.C. Sections 1961-1968, RICO, which directs plaintiff to satisfy two pleading burdens. "First, plaintiff must assert that the defendant has violated 18 U.S.C. Section 1962, the substantive RICO statute." Town of West Hartford v. Operation Rescue, 915 F.3d 92, 100 (2d Cir. 1990). This requires:

> (1) that the defendant (2) through the commission of two or more acts (3) constituting a "pattern" (4) of "racketeering activity" (5) directly or indirectly invests in, maintains an interest in, or participates in (6) an "enterprise" (7) the activities of which affect interstate commerce.

Id., quoting Moss v. Morgan Stanley, Inc., 719 F.2d 5, 17 (2d Cir. 1983), cert. denied, 465 U.S. 1025 (1984). Plaintiff must further allege that he was injured in his business or property by reason of a violating of Section 1962. See id. Plaintiffs contend that defendants, acting in concert and as an enterprise, defrauded plaintiffs, forced the sale of their business below market value, engaged in side-agreements affecting plaintiffs' interest while claiming to be acting in plaintiffs' best interests, and forced the aforementioned loan conditions and agreements upon plaintiffs knowing that this would lead to the eventual demise of plaintiffs' business. Plaintiffs allege that these acts were furthered through mail and wire fraud (18 U.S.C. Sections 1341 and 1343) and through extortionate means, in violation of 18 U.S.C. Section 1951, the Hobbs Act[1].

Notwithstanding the astounding length of the Complaint and the pleadings in this action,

1/Extortion, as defined by the Hobbs Act, "[m]eans the obtaining of property from another, with his consent, inducted by use of actual or threatened force, violence or fear, or under color of official right." 18 U.S.C. Section 1951(b) (2).

plaintiffs offer no factual allegations supporting the contention that defendants were engaged in a joint enterprise of any sort, or that defendants actions constituted more than courses of action necessitated by plaintiffs' defaults after an economic downturn in plaintiffs' businesses. A series of breaches of contract are alleged. Further, plaintiffs strongly indicate the extent of their displeasure with the way these events unfolded. However, such does not comprise a scheme to defraud plaintiffs through criminal acts.[2] Moreover, defendants' conduct, independent in origin even if conspiratorial in nature, has none of the commonality of purpose nor joinder of method to constitute a RICO enterprise. The work-out agreements were signed by the Rytmans with the advice of their lawyer, thus resulting in distribution of some of plaintiffs'

2/Notably, the Complaint identifies the "enterprise" required under 18 U.S.C. Section 1962 as being compromised of the plaintiffs (rather than the defendants) engaging in acts affecting interstate commerce. It is difficult to surmise how the alleged scheme ensued when plaintiffs seem unsure of whether it was they or the defendants who formed an enterprise.

assets to satisfy their creditors. The claim that defendants' conduct which led, with plaintiffs' agreement, to these distributions constituted extortionate threats (complaint paragraph 10, page 29) is without merit. Plaintiffs offer no evidence other than their conclusory statements, that these agreements, by which defendants obtained security interest in plaintiffs' assets in return for loans or in satisfaction of debt, undisputedly due and payable, were outside the realm of customary debt enforcement procedures. Though the agreements may have been signed while plaintiffs' business was "under economic duress" (Complaint paragraph 10, page 19), the duress was not of defendants' negligence and does not constitute extortion or fraud by the defendants. It suggests only that plaintiffs' business, simply and unfortunately met hard times. Accordingly, as plaintiffs fail to state a claim under RICO as a matter of law, defendants motions to dismiss and for summary judgment are granted.

CONCLUSION

For the foregoing reasons, defendants Milton

Jacobson, Glenn Gordon and Brown, Jacobson, Jewett and Laudone, P.C.'s motion to dismiss (Doc. #56); defendants Kofkoff Egg Farm Limited Partnership, Samuel Kofkoff, Robert Kofkoff, Joseph Fortin, Blair Hagy, Colchester Foods, Inc., Fitchville Realty, Inc., Pierce Hollow Farm's, Inc.'s motion to dismiss (Doc. # 58); defendant Connecticut National Bank's motion to dismiss (Doc. #60); and defendant Norwich Savings Society's motion for summary judgment (Doc. # 63) are granted.

SO ORDERED.

Dated at Hartford, Connecticut, this 31st day of August, 1992.

/s/ Peter C. Dorsey

Peter C. Dorsey

United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

JULIUS RYTMAN, et al. :

-vs- : Docket No. 2:91CV1146(PCD)

KOFKOFF EGG FARM LIMITED

PARTNERSHIP, et al. : (Filed Nov. 24, 1992)

O R D E R

Pertaining to the plaintiffs' motion to reconsider (document no. 111), the plaintiffs' request for leave to amend the complaint (document no. 114), the plaintiffs' motion for new trial (document no. 115-1 and 115-2), the plaintiffs' motion to alter or amend judgment to grant leave to amend judgment to grant leave to amend the complaint (document no. 117-1), the plaintiff's motion to alter or amend judgment granting defendants' motion to dismiss and for summary judgment (document no. 118), the plaintiffs'motion to open and/or vacate judgment (document no. 119), and the defendants' motion for costs (document no. 113):

The aforementioned motions are denied without prejudice. In view of the plaintiffs' appeal to the

Second Circuit, this court lacks subject matter jurisdiction over the motions currently pending in this case.

SO ORDERED.

Dated at New Haven, Connecticut, this 24th day of November, 1992.

/s/ Peter C. Dorsey

Peter C. Dorsey

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

JULIUS RYTMAN, et al. :

-vs- :Docket No. 2:91CV001146(PCD)

KOFKOFF EGG FARM LIMITED :

PARTNERSHIP, et al. :(Filed Feb. 5, 1993)

O R D E R

1. Plaintiffs' motion to reconsider (document #144) is granted. The Order dated November 24, 1992, is hereby vacated in view of the plaintiffs' subsequent withdrawal of their appeal (see United States Court of Appeals, Second Circuit, Mandate dated 12/11/93 and filed with this court 12/28/92). The motions denied without prejudice in the November 24 Order are hereby revived and decided on the merits as follows:

a) Plaintiffs' motion to reconsider (document #111) is granted. However, upon reconsideration, the court adheres to its prior ruling, which was based on the record before it in this matter, as plaintiffs have failed to raise any arguments or facts not previously

considered by the court.

b) Plaintiffs' request for leave to amend the complaint (document #114) is denied, as plaintiffs have failed to demonstrate that leave to amend is warranted under Fed. R. Civ. P. 15(a). The proposed amended complaint merely repeats, at greater length, the legal and factual allegations contained in the initial complaint, and hence fails to remedy the deficiencies prompting judgment for the defendants.

c) Plaintiffs' motion for new trial (documents #115-1 and 115-2) is denied.

d) Plaintiffs' motion to alter or amend judgment (document #117-1) is denied.

e) Plaintiffs' motion to alter or amend judgment (document #118) is denied,

(f) Plaintiffs' motion for stay of proceedings (document #142) is denied.

2. Plaintiffs' motion for stay of proceedings (document #142) is denied as moot.

3. Plaintiffs' motion for relief (document #151) is granted in part, only insofar as it pertains to

the November 24, 1992 Order, which is vacated as stated above. The motion for relief is denied with respect to the Ruling on Pending Motions dated August 31, 1992 and the Judgment dated September 9, 1992.

SO ORDERED.

Dated at New Haven, Connecticut, this 5th day of February, 1993.

/s/ Peter C. Dorsey

Peter C. Dorsey

United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 10th day of August on thousand nine hundred and ninety-three.

RYTMAN V. KOFKOFF EGG FARM

DOCKET NUMBERS 93-7061

93-7177

(Filed Aug. 10, 1993)

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Appellants JULIUS RYTMAN, DORA RYTMAN, COLCHESTER EGG FARMS, INC., RYTMAN GRAIN, INC., JULIUS AND DORA RYTMAN PROPRIETORSHIP, PINECREST DUCK FARM TRUST, AND AGRI-FINANCE, INC.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT,

ELAINE B. GOLDSMITH, Clerk

By:

/s/ Carolyn Clark Cambell

Carolyn Clark Cambell

Chief Deputy Clerk

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

JULIUS RYTMAN, ET AL	:	
	:	
Plaintiffs,	:	
	:	
V.	:	No. 291 CV 001146 (PCD)
	:	
KOFKOFF EGG FARM LIMITED	:	
PARTNERSHIP, ET AL	:	
	:	
Defendants,	:	December 24, 1992
		(Filed Dec. 24,1992)

MOTION FOR RELIEF FROM JUDGMENTS ORDER AND/OR PROCEEDINGS

Pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, the plaintiffs seek relief from the following judgments, orders and/or proceedings of the District Court:

(1) The August 31, 1992 decision entitled Ruling on Pending Motions filed 9/3/92. (A copy of which is attached hereto and made part

hereof as Exhibit 1.)

(2) The September 9, 1992 Judgment entered on the basis of the August 31, 1992 decision entitled Ruling on Pending Motions. (A copy of which is attached hereto and made part hereof as Exhibit 2.)

(3) The November 24, 1992 Order. (A copy of which is attached hereto and made part hereof as Exhibit 3.)

The plaintiffs reasons for this motion are set forth in the Memorandum in Support of Rule 60 Motion to Relieve the Plaintiffs from a Judgment, Order or Proceeding and the Affidavit in Support of Rule 60(b) Motion of even date.

WHEREFORE, the plaintiffs pray that this Court vacate the judgments, orders and/or proceedings described herein.

THE PLAINTIFFS

By/s/ Donald R. Beebe

Donald R. Beebe, for:

BEEBE AND O'NEIL

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

JULIUS RYTMAN, ET AL	:	
	:	
Plaintiffs	:	
	:	
V.	:	NO. 291 CV 001146 (PCD)
	:	
KOFKOFF EGG FARM LIMITED	:	
PARTNERSHIP, ET AL	:	
	:	
Defendants	:	DECEMBER 24, 1992
		(Filed Dec. 24, 1992)

AFFIDAVIT IN SUPPORT OF RULE 60(b) MOTION

The undersigned, being duly sworn, deposes and says:

A. I am over eighteen (18) years of age and believe in the obligation of an oath.

B. I am an Attorney at Law admitted to practice before this Court and represent the Plaintiffs in the above captioned action.

C. On June 4, 1992, the defendant, Noriwch

Savings Society (hereinafter "NSS") filed a Summary Jugment Motion. The plaintiffs received the affidavit in support of NSS on June 17, 1992.

D. The plaintiffs sought to depose witnesses and sought additional time to conduct discovery and to prepare their response.

E. The Court scheduled a status conference on July 9, 1992 (hereinafter "status conference"). The status conference was scheduled with a Presiding Judicial Officer, Reed Murphy and the Honorable Peter Dorsey, Federal District Judge, joined the conference.

F. At the status conference, counsel for the plaintiffs raised several issues, the major issue being that plaintiffs needed more time to amass the testimony, documenatary evidence, and other competent proof to refute the issues raised by NSS's Summary Judgment Motion.

G. In response to this major issue to Presiding Judicial Officer Murphy said that all the plaintiffs needed to do was to swear to the RICO Case Statement. On this issues, Judge Dorsey noted that it if the plaintiffs "got caught with their pats down

around their ankles" (or words to that effect) and lost their motions, then they could file a Motion to Reconsider so that the situation could be rectified.

H. The plaintiffs and plaintiff's consel relied upon the representations made by Judge Dorsey and the Presiding Judicial Officer Murphy.

I. The plaintiff, Julius Rytman, along with plaintiffs' other submissions in opposition to the Summary Judgment Motion, swore to the RICO Case Statement and relied heavily on said statement.

J. On September 3, 1992, the Honorable Peter J. Dorsey entered an order relative to Motions to Dismiss and Summary Judgments. On September 9, 1992, the District Court entered a judgment on said orders. The plaintiffs filed a timely Motion to Reconsider (document no. 111), Request for Leave to Amend the Complaint (document no. 114), Motion for New Trial (document no. 115-1 and 115-2), Motion to Alter or Amend Judgment to Grant Leave to Amend the Complaint (document no. 117-1), Motion to Alter or Amend Judgment Granting Defendants' Motion to Dismiss and for Summary Judgment (document no. 118), Motion

to Open and/or Vacate Judgment (document no. 119) (hereinafter referred to as "Original Motions"). The plaintiffs also filed a memoranda in support of these motions.

K. The defendants challenged plaintiffs' motions. Included in their challenge were claims, among others, that they were inappropriate and that plaintiffs should have taken an appeal.

L. On October 8, 1992, the Plaintiffs took an appeal to the Second Circuit Court of Appeals. On November 24, 1992, the District Court denied the plaintiffs' motions without prejudice stating:

> "In view of the plaintiffs' appeal to the Second Circuit, this court lacks subject matter jurisdiction over the motions currently pending in this case."

(A copy of the Court's November 24, 1992 Decision is attached hereto and made part hereof as Exhibit A). The parties subsequent to November 24, 1992 withdrew their appeal by agreement stating that the "appeal appears to be premature." (A copy of the parties withdrawal is attached hereto and made part hereof as Exhibit B). A copy of the Second Circuit granting

the withdrawal is attached as Exhibit B2.)

M. The plaintiffs immediately informed the District Court of the withdrawal of the appeal (a copy of the December 4, 1992 letter to Judge Dorsey is attached as Exhibit C), filed a Motion to Reconsider the November 24, 1992 Order on December 4, 1992 (a copy of which is attached as Exhibit D), and re-filed and/or renewed their motions denied without prejudice (a copy of Plaintiffs' Re-filing of and/or Renewal of Motions (without exhibits) is attached hereto and made part hereof as Exhibit E).

N. By documents dated December 17 and 18, 1992 (and received by the plaintiffs on December 21, 1992), Milton L. Jacobson, Glenn M. Gordon and Brown Jacobson Jewett and Laudone, P.C. (hereinafter collectively "Brown Jacobson") and the defendants, Kofkoff Egg Farm Limited Partnership, Pierce Hollow Farms, Inc., Fitchville Realty, Inc., Samuel Kofkoff, Robert Kofkoff, Joseph Fortin and Blair Hagy (hereinafter collectively the "Kofkoff Defendants") objected to the plaintiffs Motion to Reconsider,

dated December 4, 1992. Brown Jacobson also objected to the "Plaintiffs' Re-Filing of and/or Renewal of Motion", dated December 4, 1992. The Kofkoffs also objected to the Rule 59 Motions.

O. In the "Kofkoff Defendants' Objection to Plaintiffs' Motion to Reconsider", dated December 18, 1992, the Kofkoff's claim inter alia, the following:

> "The plaintiffs' Motion for Reconsideration dated September 18, 1992 under Local Rule 9(e) was inappropriate and untimely, since both the Local Rules and the Federal Rule of Civil Procedure do not provide for reconsideration of a ruling once judgment has entered."

P. In Brown Jacobson's "Objection to Plaintiffs' Re-Filing of and/or Renewal of Motions", Brown Jacobson object inter alia, "on the grounds that no such motion or procedure is authorized by the Federal Rules of Civil Procedure."

Q. It is the Plaintiffs position that:

1. That the District Court had subject matter jurisdiction to rule on the merits of their Original Motions when it held that it did not have subject matter jurisdiction on November 24, 1992 on the basis of clear authority from the United States Supreme

Court and the Second Circuit and Rule 4 of the Appellate Rules (Griggs v. Provident Consumers Discount Company, 459 U.S. 56, 103 S. CT 400 (1982); Fisher v. Klein, 873 F.2d 626 (2d Cir. 1989); Rados v. Celotex Corp., 809 F.2d 170 (2d Cir. 1986); Sutliff, Inc., v. Donavan Companies, Inc., 727 F.2d 648 (7th Cir. 1984); Schauner v. Coombe, 108 F.R.D. 180 (W.D.N.Y. 1985). See also Northwestern National Insurance Co. v. Alberts, 937 F. 2d 77 (2d Cir. 1991); McCowan v. Sears Roebuck and Co., 908 F.2d 1099 (2d Cir. 1990); National Advertising Co. v. Babylan, 900 F.2d 551 (2d Cir. 1990); Wilson v. Great American Industries, 770 F Supp. 85 (N.D.N.Y. 1991.). Therefore, the District Court was mistaken as to the law on that issue and the order entered on November 24, 1992 should be vacated and plaintiffs relieved from its affect.

2. That any impediment to the District Court's jurisdiction has been removed by the withdrawal of the appeal to the Second Circuit Court of Appeal by consent of the parties (Exhibit B1) and the subsequent granting of the withdrawal by the Second

Circuit (Exhibit B2).

3. That the District Court can now rule on the merits of the Plaintiffs' Original Motions without further action of any party.

4. That the District Court can rule on the merits of the Plaintiffs Original Motions based upon the Plaintiffs' Motion to Reconsider, dated December 4, 1992.

5. That the District Court can rule on the Plaintiffs' Refiling of and/or Renewal of Motions, dated December 4, 1992.

6. That the District Court was mistaken as to the law and facts raised by the Motions to Dismiss and Summary Judgment when the Court filed its decision on September 3, 1992 and entered judgment on September 9, 1992.

7. That a misunderstanding may have resulted from a chambers conference with the Honorable Peter Dorsey, Federal District Court Judge and the presiding Judicial Officer Murphy on July 9, 1992 or as a result of said conference a mistake, inadvertise, or excusable neglect occurred as a

result of said conference.

8. That the plaintiffs were surprised that the District Court granted the Motions to Dismiss and the Summary Judgment Motion on the basis that it did and in the manner that it did for the reasons set forth in the Plaintiffs' Original Motions and the Memoranda filed by the plaintiffs in support of the Original Motions. A complete set of these motions and memoranda accompany this mtion.

9. A motion made pursuant to Rule 60(b) is appropriate to correct these issues and to relieve the plaintiffs from the judgment, order, and/or proceeding. E.g. Barum v. Clark, 927 F.2d 698 (2d Cir. 1991); Chanofskey v. Chase Manhattan Corporation, 530 F.2d 470 (2d Cir. 1976); Schildaus v. Moe, 335 F.2d 529 (2d Cir. 1964); Tarkington v. U.S. Lines Co., 222 F.2d 358 (1955).

/s/Donald R. Beebe

Donald R. Beebe

Subscribed and sworn to before me

this 24th day of December, 1992.

/s/Renee M. LaCharite

Notary Public/My Comm. Exp. 3-31-95

FEDERAL RULES OF CIVIL PROCEDURE

Rule 9. Pleading Special Matters

(b) Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

Rule 12

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in

law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(f) Motion to Strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 15. Amended and Supplemental Pleadings.

(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 56. Summary Judgment

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 59. New Trials; Amendment of Judgments

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 81

(c) Removed Actions. These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, the defendant shall answer or present the other defenses or objections available under these rules within 20 days after the receipt through service or otherwise a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within 20 days after the service of summons upon such initial pleading, then filed, or within 5 days after the filing of the petition for removal, whichever period is longest. If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury under Rule 38 shall be accorded it, if the party's demand therefor is served within 10 days after the petition for removal is filed if the party is the petitioner, or if not the petitioner within 10

days after service on the party of the notice of filing the petition. A party who, prior to removal, has made an express demand for trial by jury in accordance with state law, need not make a demand after removal. If state law applicable in the court from which the case is removed does not require the parties to make express demands in order to claim trial by jury, they need not make demands after removal unless the court directs that they do so within a specified time if they desire to claim trial by jury. The court may make this direction on its own motion and shall do so as a matter of course at the request of any party. The failure of a party to make demand as directed constitutes a waiver by that party of trial by jury.

18 U.S.C.

Section 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for the unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C.

Section 1343. Fraud by wire, radio or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C.

Section 1961. Definitions

As used in this chapter-

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud),

section 1344 (relating to financial institution fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate trasportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce failities in the commission of murder-for-hire), sections 2312 and 2313 (relating to

interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white salve traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or felonious manufacture, importation, receiving, concealment, buying, selling or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;

18 U.S.C.

Section 1962.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprises's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

CONNECTICUT GENERAL STATUTES

Section 53a-119. Larceny defined. A person commits larceny when, with intent to deprive another of property or to appropriate the same to himself or a third person, he wrongfully takes, obtains or withholds such property from an owner. Larceny includes, but is not limited to:

(1) Embezzlement. A person commits embezzlement when he wrongfully appropriates to himself or to another property of another in his care or custody.***

(3) Obtaining property by false promise. A person obtains property by false promise when, pursuant to a scheme to defraud, he obtains property of another by means of a representation, express or implied, that he or a third person will in the future engage in particular conduct, and when he does not intend to engage in such conduct or does not believe that the third person intends to engage in such conduct. In any prosecution for larceny based upon a false promise, the defendant's intention or belief that the promise would not be performed may not be established by or inferred from the fact alone that such promise

was not performed.***

(5) Extortion. A person obtains property by extortion when he compels or induces another person to deliver such property to himself or a third person by means of instilling in him a fear that, if the property is not so delivered, the actor or another will: (A) Cause physical injury to some person in the future; or (B) cause damage to property; or (C) engage in other conduct constituting a crime; or (D) accuse some person of a crime or cause criminal charges to be instituted against him; or (E) expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or (F) cause a strike, boycott or other collective labor group action injurious to some person's business; except that such a threat shall not be deemed extortion when the property is demanded or received for the benefit of the group in whose interest the actor purports to act or (G) testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or (H) use or abuse his position as a

public servant by performing some act within or related to his official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely; or (I) inflict any other harm which would not benefit the actor.***

CONNECTICUT GENERAL STATUTES

Section 22-323a. Intensive poultry farming. Regulations. Inspection for noncompliance.(a) As used in this section, intensive poultry farming means the raising or maintaining of more than twenty thousand fowl, fed primarily by methods other than grazing, and confined within one or more pens or buildings. The commissioner of agriculture shall adopt regulations in accordance with the provisions of chapter 54 concerning acceptable management practices of intensive poultry farming including transportation of poultry waste on public roads.

(b) The commissioner of agriculture may inspect or cause to be inspected by his agents any intensive poultry operation for compliance with the regulations adopted under subsection (a) of this section. He may issue orders as he deems necessary for the correction of such noncompliance including the quarantine of premises and fowl.

CONNECTICUT GENERAL STATUTES

Section 22-323a-1. Definitions.

"Commissioner" means the commissioner of agriculture or his authorized agent.

"Department" means department of agriculture.

"Poultry" means all domesticated fowl.

"Premises" means that portion of a tract of land with the building thereon or a part of a building with its grounds or other appurtenances which is used for intensive poultry farming.

"Waste management system" means any structure, facility, or equipment for the storage, treatment, or disposal of waste products from an intensive poultry farm, and includes the methods of operation of such systems.

CONNECTICUT GENERAL STATUTES

Section 22-323a-2. All intensive poultry farming operations shall meet the following minimum acceptable management practices:

(a) Premises upon which intensive poultry farms are located shall be kept free from accumulations of garbage, rubbish, vegetative growth or any other material which because of its character, condition, or improper storage constitutes or may become a breeding place or favorable habitat for flies or vermin, or may cause a threat to the environment or public health, or constitutes a public nuisance.

(b) The premises on which intensive poultry farms are operated shall be maintained in such a manner as to minimize soil erosion and sedimentation of water courses.

(c) The area around buildings must be sloped to promote rapid runoff of surface water and prevent puddles and wet areas from forming.

(d) No structure housing poultry, farm wastes, or farm equipment used for intensive poultry farming shall be constructed or maintained so as to allow

water or waste to move in or out of the structure when such condition constitutes or may constitute a threat to the environment or public health, or constitute a public nuisance.

CONNECTICUT GENERAL STATUTES

Section 22-323a-3. Water quality

Waste management systems including but not limited to lagoons and subsurface disposal systems shall be properly constructed, operated and maintained so as not to create a threat to the environment or public health, or constitute a public nuisance.

CONNECTICUT GENERAL STATUTES

Section 22-323a-4. Disposal of waste eggs

Waste eggs shall be stored and disposed of in a manner so as not to create a threat to the environment or public health, or constitute a public nuisance.

CONNECTICUT GENERAL STATUTES

Section 22-323-a-5. Fly control

Intensive poultry farms shall be operated and maintained so as not to be a breeding place for excessive fly populations. Excessive fly populations shall be determined by the commissioner by examining fly specs on white cards within the poultry house or by examining the manure for larva or other appropriate methods. Acceptable readings shall be determined by the commissioner with the advice and assistance of the state entomologist.

CONNECTICUT GENERAL STATUTES

Section 22-323a-6. Manure management

(a) Manure shall be stored, managed, and disposed of in a manner which will minimize and control the breeding of flies and vermin, minimize and control offensive odors, and not create a threat to the environment or public health, or constitute a public nuisance.

(b) Manure transported over public highways on farm vehicles shall be in leak proof containers, spreaders, or vehicles. Manure transported in other than farm vehicles shall be in leak proof containers and be covered if necessary to prevent debris from blowing or falling out of the transporting vehicle.

(c) Any manure spilled on public roads or dumped on any property other than that on which the intensive poultry farm is located, without the owner's permission, shall be removed immediately by the vehicle owner or operator.

CONNECTICUT GENERAL STATUTES

Section 53a-122. Larceny in the first degree: Class B felony.

(a) A person is guilty of larceny in the first degree when he commits larceny as defined in section 53a-119 and: (1) The property or service, regardless of its nature and value, is obtained by extortion, (2) the value of the property or service exceeds ten thousand dollars, (3) the property consists of a motor vehicle, the value of which exceeds ten thousand dollar, or (4) the property is obtained by defrauding a public community, and the value of each property exceeds two thousand dollars.

(b) In any prosecution under subdivision (3) of subsection (a) of this section, evidence of (1) forcible entry, (2) forcible removal of ignition or (3) alteration, mutilitation or removal of a vehicle identification number shall be prima facie evidence of a larcenous intent.

(c) Larceny in the first degree is a class B felony.

CONNECTICUT GENERAL STATUTES

Section 53a-123 Larceny in the second degree: Class C felony.

(a) A person is guilty of larceny in the second degree when he commits larceny as defined in section 53a-119 and: (1) The property consists of a motor vehicle, the value of which exceeds five thousand dollars, (2) the value of the property or service exceeds five thousand dollars, (3) the property, regardless of its nature or value, is taken from the person of another, or (4) the property is obtained by defrauding a public community, and the value of such property is two thousand dollars or less.

(b) In any prosecution under subdivision (1) of subsection (a) of this section, evidence of (1) forcible entry, (2) forcible removal of ignition or (3) alteration, mutilation or removal of a vehicle identification number shall be prima facie evidence of a larcenous intent.

(c) Larceny in the second degree is a class C felony.

CONNECTICUT GENERAL STATUTES

Section 53a-124. Larceny in the third degree: Class D felony.

(a) A person is guilty of larceny in the third degree when he commits larceny as defined in section 53a-119 and: (1) The property consists of a motor vehicle, the value of which is five thousand dollars or less; (2) the value of the property or service exceeds one thousand dollars; (3) the property consists of a public record, writing or instrument kept, held or deposited according to law with or in the keeping of any public office or public servant; or (4) the property consists of a sample, culture, microorganism, specimen, record, recording, document, drawing or any other article, material, device or substance which consitutes, represents, evidences, reflects or records a secret scientific or technical process, invention or formula or any phase or part thereof. A process, invention or formula is "secret" when it is not, and is not intended to be, available to anyone other than the owner thereof or selected persons having access thereto for limited purposes

with his consent, and when it accords or may accord the owner an advantage over competitors or other pesons who do not have knowledge or the benefit thereof.

(b) In any prosecution under subdivision (1) of subsection (a) of this section, evidence of (1) forcible entry, (2) forcible removal of ignition or (3) alteration, mutilation or removal of a vehicle identification number shall be prima facie evidence of a larcenous intent.

(c) Larceny in the third degree is a class D felony.